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...IN THE...

Supreme Court

OF THE

United States

October Term 1905

Oscar D. Halsell, Oscar G. Lee, Leonidas L. Land, Daniel P. Wright and Jean H. Everest,
Appellants.

vs.

William C. Renfrow and R. J. Edwards,
Appellees.

No. 254.
(19748)

BRIEF OF APPELLEES.

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WARDEN-DERMOTT PTG. CO., OKLAHOMA CITY

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BRIEF OF APPELLEES.

STATEMENT OF THE CASE.

In some respects we desire to controvert and in others to enlarge upon the statement of the case in brief of appellants.

On page 2 of such brief, attention is called to a check for $500.00 given by L. L. Land to George J.

Shields, which was cashed by Shields, "and the amount and no part of it has been paid or tendered back but is still retained." Again, on page 10 of such brief, appellants refer to a finding of the court that, "$500.00 of the purchase money was received and retained by the vendor." We respectfully suggest that there is no such finding nor is there any evidence upon which such a finding could be based. The fact is, that Shields cashed the check and still retains the money, neither the appellants nor the appellees being willing to receive the same from him. (See letter from Shields to Renfrow, p. 118 of printed record.) Possibly this letter is not properly in evidence in the case, but there is no evidence in the case tending to show that Renfrow ever received any of the proceeds of the check, and the Supreme Court of the Territory find that he did not. (Rec. 133).

On page 2 of brief, appellants set out a copy of the check above referred to. A fact omitted in their statement of the case is that the appellants on their own confession (Rec. 23), afterwards, on advice of attorney, fraudulently mutilated this check by writing thereon the words: "On purchase of forty acres of land of W. C. Renfrow, known as Cuningham tract west and adjoining Washington school building, O. K. City, Oklahoma Co., O. T." (Printed Record 23), and then attached to their petition a copy of the check as mutilated (Record 18) and alleged therein that such check, as fraudulently altered, was a memorandum in writing.

executed by the said Shields, as agent of Renfrow, (Rec. 14).

On page 3 of brief, appellants say that, with the knowledge and consent of Renfrow, and his agent, "the purchaser caused the land to be surveyed into lots and blocks and a plat to be made, sold a number of the lots, received part payment and removed the fencing from the land and had a portion of it leveled down." The fact is, that they went to the land before Renfrow arrived at Oklahoma City (Rec. 125) and found it in possession of Springstein, who ordered them off; that they attempted to forcibly survey it but, as fast as they set stakes, the German working for Springstein plowed them out, (Record 80). Appellants then went away, refused to complete the trade with Renfrow, because they could not get possession and made no further attempt to take possession until about January, 1902, when, during the absence of Mr. Edwards from the city, and long after the suit was begun they took forcible possession of part of the land, (Record 90-91).

Appellants absolutely refused to close the deal with Renfrow unless he would give them immediate possession, (See letter from Halsell, Record 45, and opinion Rec. 125), until after the land had been sold to another and increased in value, when they began to claim that they were entitled to specific performance because they had been in possession all the time.

On page 7 of their brief is a written tender, made by Halsell and a letter writen by him to Renfrow, both of which show that at that time they were not willing to consummate the trade without immediate possession being given them, which they knew was impossible. Renfrow had previously offered to deliver the deed and to give such possession as he could obtain at as early a date as possible, but Halsell insisted that unless he could get immediate possession he did not want to have anything to do with it (Record 161).

On page 7 of brief, appellants say: "Edwards had knowledge of the transaction and was upbraided a number of times as endeavoring to obstruct the performance of the contract." The record shows that Edwards knew that the appellants had been negotiating for this land but was informed that such negotiations had been discontinued (Record 93-94); that sometime previous to the purchase by Edwards, Mr. Lee asked him if he was figuring on that place and, being told that he was, said: "You are interferring with me," (Record 91).

On page 10 of brief, appellants call attention to the fact that the deed made to Edwards was the same deed that had previously been executed to Halsell with dates changed but they say "without a re-execution." The deed, however, was re-acknowledged (Record 109-110).

On page 10 of brief, appellants say that the territorial courts made no finding as to the notice to Ed-

wards or the effect of such notice. It is true no special finding was made, but a general finding of all the issues in favor of defendants was made (Record 114.) The petition alleges that Edwards purchased with notice, the answer denies this (Record 27) and a general finding of the issues in favor of the defendants is equivalent to a special finding that Edwards did not have notice.

BRIEF AND ARGUMENT.

Instead of discussing this case as involving only three questions, as do appellants, we shall discuss it under nine heads:

I. Is the case properly here for the consideration of this court and, if so, to what extent can this court look into the evidence?

II. Specific performance is a matter of discretion and the ruling of the trial court and the supreme court of the Territory should not be interferred with, unless there has been an abuse of discretion.

III. That there was no writen contract between the parties as required by the statute of frauds.

IV. That there was never even an oral contract between the parties, the terms of which were all agreed upon.

V. That there was not a sufficient part performance to take the case out of the statute of frauds.

VI. Are appellees estopped from denying the validity of the contract?

VII. That Edwards is an innocent purchaser and therefore no specific performance could be had.

VIII. That by the fraudulent alteration of the check the whole contract becomes unenforceable, even if the documents were otherwise sufficient to constitute a legal contract.

IX. That appellants are estopped by having refused the only performance possible.

I.

IS THE CASE PROPERLY HERE FOR THE CONSIDERATION OF THIS COURT AND, IF SO, TO WHAT EXTENT CAN THIS COURT LOOK INTO THE EVIDENCE?

By the Act of April 7th, 1874, relating to appeals from territorial courts, it is provided that, "Instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission and rejection of evidence when excepted to, shall be made and certified by the court below and transmitted to the supreme court, together with the transcript of the proceedings and judgment or decree." 18 U. S. Stat. at L., Part 3, page 27. Under this Act, "If there is no finding of facts or statement of facts in the nature of a special verdict,

it must be assumed that the judgement was justified by the evidence." Marshall vs. Burtis, 172 U. S. 630, 43 Law Ed. 579. "Merely stating in its opinion the facts upon which it proceeds, but without making special findings, is not a compliance with this act." Thompson vs. Ferry et al, 180 U. S. 484, 45 Law Ed. 633.

But section 9 of the "Act to Provide a Temporary Government for the Territory of Oklahoma," approved May 2nd, 1890, provides that "writs of error and appeals from the final decisions of said supreme court shall be allowed and may be taken to the supreme court of the United States in the same manner and under the same regulation as from the circuit courts of the United States." and it has been held that the Act of 1874 does not apply to the Territory of Oklahoma so far as making appeal the proper method of obtaining a review of a law case tried to the court. Comstock vs. Eagleton, 196 U. S. 99, 49 Law Ed. 402. Oklahoma City vs. McMaster, 196 U. S. 529, 49 Law Ed. 587. These decisions leave unsettled the question whether any part of the Act of 1874 applies to Oklahoma Teritory. It would seem that Section I of said Act should apply to Oklahoma, as there is nothing in our Organic Act taking its place, and the proviso to section 2, quoted above, if applicable, would greatly simplify taking appeals to this court, and also eliminate the questions hereafter discussed as to the extent to which this court will weigh testimony.

If the Act of April 7th, 1874, applies, then the supreme court of Oklahoma, having made no findings in the nature of a special verdict, the evidence will be assumed to sustain the judgment and the judgment be affirmed.

But, assuming that the Act of 1874 does not apply and that the proper method of taking an appeal from the supreme court of Oklahoma to this court is by transcript of the evidence at large, to what extent will this court look into and weigh such evidence? On appeals from the United States circuit courts where the court below has tried the case upon written testimony, it is apparent that this court can judge the weight of such testimony as well as the court below, and the fact that it can do so furnishes the reason that it may do so; but, under the practice in the Territory of Oklahoma, equity cases may be tried to a jury and when tried by the court are heard upon oral testimony the same as law case. In the case at bar, practically all the testimony was by witnesses present in court and no appellate court can judge of the weight to be given their testimony as well as the court that heard them testify. For this reason, the supreme court of Oklahoma has announced and adheres to the doctrine that even in an equity case it cannot weigh the evidence.

"Under the Code of Civil Procedure, the court now hears oral testimony in chancery cases, and like a jury, considers the witnesses, observes their intelligence and capacity, their fairness or bias, their manner and characteristics, and has thus opportunities for judging of

the value of the testimony, such as this court cannot have. The rule is therefore, here adopted as in other states which have the same practice act, that a finding of fact by the court is equivalent to a verdict by a jury; and if there is testimony to support the material allegations of the petition, this court cannot disturb the finding and judgment even though the finding of fact by the trial court might be contrary to the judgment of the appellate court."

Ellison vs. Beannabia, 4 Okl. 352.

The Civil Procedure of Oklahoma, both original and appellate is governed by civil code, which civil code was literally borrowed from the state of Kansas in 1893 and was received with the settled construction of years in that state to the same effect.

Eckert vs. Rule, 51 Kan. 703, 32 Pac. 657.

Medill vs. Snyder, 61 Kan. 15, 58 Pac. 962.

Railway Co. vs. Hildebrand, 52 Kan. 284, 34 Pac. 738.

This rule being firmly established in Oklahoma and being the only rule that is reasonable under the Code of Civil Practice adopted there, it would seem to follow that this court in reviewing the decisions of that court acts only in the place of that court and can no more weigh the testimony than it could, and that this court should follow the rule of the court appealed from. Sanford vs. Sanford, 139 U. S. 642. 35 Law Ed. 290. It would seem strange, indeed, if this court should reverse the supreme court of Oklahoma for not weighing

the testimony when it had no power to do so. For this court to review the evidence would be to exert a power not confided to the court below and would involve the exertion of original and not appellate jurisdiction.

On the whole, we feel that this court must say either that the Act of April 7th, 1874, applies to Oklahoma so far as to require that on appeal a statement of the facts in the nature of a special verdict be made by the court below and that, in the absence of such a statement, the evidence will be assumed to sustain the judgment; or that this court stands in the position of the supreme court of the Territory, without power to weigh the evidence. If the latter be true, then a general finding, as there was in this case in favor of the appellees, includes a finding of all the necessary facts to constitute the claim of the party in whose behalf the decree is rendered. Gardenhire vs. Gardenhire, 2 Okl. 484. If the first be the case, then this appeal must be affirmed with no consideration of the evidence, but if the latter be the rule then the evidence may be examined to see whether there is any testimony reasonably tending to support the decision of the courts below, and every disputed material question of fact upon which there is any conflict in the testimony, no matter where the preponderance may be, is resolved in favor of the appellees.

Among other facts put in issue is, whether Edwards was a bona fide purchaser from Renfrow, without no-

tice; whether there was any part performance of the pretended contract; whether Renfrow or the appellees were at fault in rejecting title on account of the temporary possession of Springstein; whether Renfrow ever undertook to deliver instant possession; whether the appellants refused a reasonable time for him to obtain possession; whether the whole deal was called off at the conference at the Lee Hotel, where Halsell told Renfrow that he did not waat to have anything to do with it, unless they could get immediate possession.

II.

SPECIFIC PERFORMANCE IS A MATTER OF DISCRETION AND THE RULING OF THE TRIAL COURT AND THE SUPREME COURT OF THE TERRITORY SHOULD NOT BE INTERFERRED WITH, UNLESS THERE HAS BEEN AN ABUSE OF DISCRETION.

"There is no question but that specific performance is not an absolute right but a matter which rests entirely in the judicial discretion, exercised according to the settled principles of equity and not arbitrarily or capriciously and always with reference to the facts of the particular case.

26 Amer. & Eng. Enc. (2nd Ed.) 62, and cases cited.

McCabe vs. Matthews, 155 U. S. 550, 39 Law Ed. 256.

The facts of the case at bar show a pretended contract unfair at the time specific performance is in-

sisted upon, uncertain as to the description of the land and the amount to be paid, incomplete in that at no time after the preliminary telegrams, did the minds of the parties meet upon all the terms of the contract to be made, unilateral, in that at no time did the appellants sign any paper, nor was there any contract which Renfrow could have enforced against them, and the facts further show that the appellants were unwilling to perform the pretended contract in the only way performance was possible, and refused to accept such performance until the land had enhanced in value and Renfrow had sold and conveyed it to Edwards for a full and valuable consideration.

A case can scarcely be conceived wherein, if the appellants had made a showing under which specific performance might be had, there is a stronger appeal to the inclination of a court of equity to refuse specific performance as inequitable and unfair.

After having refused to perform the contract because immediate possession could not be given and insisting that they would accept no performance, except the one known to them to be impossible, and having waited until the land was conveyed to another, who took it with the possession they had refused, and then, when the land had increased in value, insisting on a performance which could not have given them immediate possession and could not have placed them in possession

sooner than they would have been under the tender which they refused manifests extremely bad faith and should be sufficient to justify the court in refusing the relief asked for by them, even though they had made a technical case for specific performance.

III.

THAT THERE WAS NO WRITTEN CONTRACT BETWEEN THE PARTIES AS REQUIRED BY THE STATUTE OF FRAUDS.

The claim of a written contract must be based upon some or all of nine writings introduced in evidence. These are: First, Check given by Land to Shields, February 14th, 1901, which, before it was mutilated by appellants, did not in any way show what it was given for. (Record 43).

Second, Telegram of same date from Shields to Renfrow reading: "Have sold the forty acres ten thousand cash, five hundred forfeit. Answer." (Record 43).

Third. Telegram of same date from Renfrow to Shields reading: "I confirm sale by you ten thousand cash five hundred forfeit." (Record 43).

Fourth. Letter of February 14th, 1901, from Renfrow to Lee stating that he had received a proposition and wired acceptance. (Record 44).

Fifth. Letter from Renfrew to Stone of February 9th, 1901, stating that he would not sell the land for

less than ten thousand dollars cash and that he had made the same terms to Owen & Welsh and Shields. (Record 44).

Sixth. Letter of February 25th, 1901, from Renfrow to Halsell, advising him that deed had been sent to Western National Bank. (Record 44-45).

Seventh. Deed executed by Renfrow and wife to Halsell reciting a consideration of ten thousand dollars, and which was never delivered.

Eighth. Letter from Halsell to Renfrow written February 27th, after appellants had refused to accept deed with such possession as Renfrow could give, in which Halsell says that he demanded possession of the land in consideration of the tender made by him and expresses himself that Renfrow could not under any circumstances expect them to take the land without possession. (Record 45).

Ninth. Letter from Renfrow to Halsell written March 1st, 1901, after appellants had refused to accept deed with such possession as Renfrow could give, in which no land is described and no proposition is made.

In considering whether these writings constitute a written contract within the statute of frauds, we must take each instrument by itself, except that where one instrument refers to another, the two may be considered together. The rule is that "two papers to make one

memorandum must contain a reference in one of them to the other."

Reed on Statute of Frauds, Sec. 344.

"Memoranda which do not refer to each other cannot be connected by verbal evidence."

Id. Sec. 352.

"The memorandum may be constituted of several writings as letters between the parties, but their connection and relations to each other must appear by the writings themselves, and cannot be shown by parol evidence of what the parties intended."

Tice vs. Freeman (Minn.) 15 N. W. 674.

"While no particular form of memorandum of sale is required by the statute of frauds, where several writings are relied on, they must be so connected by mutual reference as to make the contract clear without the aid of outside evidence connecting them."

Devine vs. Warner (Conn.) 56 Atl. 563.

With this rule in mind, we will take up each instrument referred to by the appellants and discuss its sufficiency as a memorandum under the statute of frauds; after which we will discuss some of the objections which apply equally to all of the claimed memoranda.

First. The check, as stated above, does not purport on its face to be given as part payment on any contract whatever. The greatest effect that can be given it is to treat it as a receipt given by Shields to Land for $500.00, without stating upon what account it was to be applied or for what purpose it was given.

"Receipts of payments on a parol contract for the sale of lands are not sufficient to take it out of the statute of frauds."

Williams vs. Morris 95 U. S. 444, 24 Law Ed. 360.

"An ordinary receipt for a portion of the purchase money for real estate will not constitute such a memorandum as will satisfy the statute of frauds, unless it shows on its face or by reference to some other instrument, every material part of a valid contract on the subject."

Fox vs. Easter, (Okla.) 62 Pac. 283.

It was probably in view of this rule that the appellants, afterwards mutilated the check as set out in their second amended petition and then attempted to use it as mutilated, to satisfy the statute of frauds. There could have been but one purpose in mutilating this check, and that was to make a fraudulent use of it and, even if the check as originally given had been sufficient to show a valid contract, appellants could not use it to establish their case after they had deliberately altered it for the express purpose of using it to perpetrate a fraud.

Second and Third. The two telegrams may be considered together, as one is in answer to the other. They are not sufficient to constitute a contract under the statute of frauds, for three reasons:

(a). They do not, on their face, purport to be a contract, but merely to be the authority from Renfrow for Shields to make a contract as his agent. Suppose Ren-

frow had executed to Shields a formal power of attorney, authorizing him to sell the land in question to any person, on terms therein stated and Shields had then made a verbal contract to sell on the terms stated in the power of attorney, it would not be for a moment contended that this would constitute a valid sale under the statute. Where a sale of real estate is made by an agent there must be shown not only the written authority of the agent, but the agent then must have made a valid written contract.

(b). The telegrams do not constitute a valid contract under the statute for the further reason that they do not name the purchaser.

"A memorandum in writing necessary to make a valid contract within the meaning of the statute of frauds though signed by the defendant and describing with sufficient distinctness the property sold and the consideration to be paid, is not sufficient to sustain an action unless the other party to the agreement is either named in the memorandum or so designated in some papers signed by the defendant that he could be identified without parol proof."

Grafton vs. Cummings, 99 U. S. 100, S. C. 25 Law. Ed. 366.

To the same effect are:

Breckenridge vs. Crocker, (Cal.) 21 Pac. 179.
Lewis vs. Wood, (Mass.) 26 N. E. 862.

(c). The telegrams are invalid as a contract for the third reason that they do not describe in any way the land. It will be remembered that the only mention of

the land in their telegram is as "the forty acres."

"A contract for the conveyance of lands, which a court of equity will specifically enforce, must be certain in its terms, and that certainty required has reference to both description of the property and the estate to be conveyed; and accordingly, wherever the property cannot be identified as the property described in the contract, specific performance will be denied."

Ferguson vs. Blackwell (Okla.) 58 Pac. 647.

"A contract for the conveyance of lands, which a court of equity will specifically enforce, must be certain in its terms and in the description of the property and the estate to be conveyed."

Preston vs Preston, 95 U. S. 200. 24 Law. Ed. 494.

The land in controversy does not contain forty acres, neither did the tract which Renfrow supposed he owned, but even if the land in controversy was just forty acres, no one can call the mere statement "Forty Acres" a description of the land.

Fourth. The letter from Renfrow to Lee of February 14th, 1901, does not pretend to state any contract, but merely says that the writer has accepted a proposition made.

Fifth. The letter from Renfrow to Stone was written before appellants pretend that they had any contract for this land, consequently it cannot refer to the claimed contract. At most, it is merely an acknowledgement by Renfrow of the fact that he had verbally placed this land with Shields for sale at $10,000.

Sixth. Letter from Renfrow to Halsell in which he says the deed has been sent to the bank, to give appellants another chance of completing the deal if they desire to do so. Nothing can be claimed under this writing apart from the other writings.

Seventh. The deed executed by Renfrow to Halsell cannot be considered as a memorandum under the statute of frauds for the reason that it was never delivered and was not executed in accordance with the contract appellants are attempting to enforce.

"Where a deed from the grantor and a mortgage from the grantee was made in pursuance of a verbal contract of sale of real estate, but not delivered, they cannot be used as a memorandum, within the statute of frauds upon which to enforce specific performance in equity."

Day vs. Lacasse (Me.) 27 Atl. 124.

"The execution of a deed without delivery, in such sense that the grantee acquires control of it, does not constitute a compliance with the statute of frauds, even though the grantee may temporarily have it in his possession."

Steel vs. Fife 48 Iowa 99, 30 Am. Rep. 388.

"The parties to an oral agreement for the sale of land went together to an attorney and had a deed therefor drawn, and the grantor signed it, and the grantee paid part of the consideration, and, after both parties had looked at the deed and expresed themselves satisfied with the form of it, the grantor took it for the purpose of procuring from his wife a release of her dower. Held, that there had been no delivery of the deed, so as

to give it effect either as a deed or memorandum in writing of the agreement within the statute of frauds.

Parker vs. Parker 67 Mass. (Gray) 409.

"A deed executed and handed to the grantee for examination merely, and not so as to constitute a delivery, is not a sufficient memorandum of a contract to convey the lands, within the statute of frauds."

Comer vs. Baldwin 16 Minn. 172 (Gil. 151).

"The signing of a deed for lands is not sufficient contract to satisfy the statute of frauds, unless delivered to the vendee."

Johnson vs. Brooks, 31 Miss. 17; 66 Am. Dec. 547.

"A contract for the sale of real estate was made by parol, and a deed thereunder made by the grantor, and left in the hands of his agents to await the arrival of the grantee's money. Held, that as there was no delivery of the deed, it was not available as a memorandum of a contract, nor would a certain mortgage and notes executed by the grantee, but not delivered, constitute a part of such memorandum."

Weir vs. Batdorf, 24 Neb. 83; 38 N. W. 22.

"Where defendant on entering into a parol contract with plaintiff for the purchase of land, paid a portion of the purchase money, and plaintiff thereupon delivered a deed, fully executed, to a third person under an agreement that he should deliver it to defendant when he paid the balance, which payment defendant promised to make, an action to recover the sum unpaid could not be maintained, as it was an action to enforce a parol contract for the sale of land, which was void under the statute of frauds."

Cagger vs. Lansing 43 N. Y. 550, reversing judgment (1870), 57 Barb. 421.

"The owner of land agreed with several parties to convey it to them and to execute deeds therefor, in accordance with the various portions which should fall to each from a lottery held to determine their shares. Deeds for the several lots were executed, but never delivered. In an action by the owner against one of the purchasers to recover a lot, held that, since the deed to the lot was never delivered, it was a parol sale of land and void, under the statute of frauds."

Allebach vs. Godshalk, (116 Pa. St.) 9 Atl. 444.

"A contract for the sale of real estate, wholly oral, does not become enforceable by reason of the fact that the vendor has signed a deed in accordance with the oral contract, so long as that deed remains in his possession or under his control; and it is equally under his control while it is in the possession of his attorney. Nor does the signing of a deed of land agreed to be conveyed, and its being sent to the attorney of the person signing, constitute a memorandum in writing which will satisfy the statute of frauds."

Morrow vs. Moore (Me.) 57 Atl. 81.

Appellants cite Ryan vs. United States, 136 U. S. 68, 34 Law. Ed. 447, as holding that a deed delivered for purposes of examination is competent to show the precise location of the property which the memorandum of sale was intended to embrace. In that case, the language quoted by appellants was not necessary to a decision and the court really holds that the previous writings fully described the land to be conveyed, but giving to the language of Mr. Justice Harlan full weight, that was a case where the deed was delivered upon con-

dition, and this is a case where there was no delivery whatever.

Though not cited by appellants, there are a few authorities holding that an undelivered deed may be a sufficient memorandum within the statute of frauds, provided such deed contains a memorandum of the agreement. This rule, however, would not help appellants in this case for the deed sent to the bank did not contain any memorandum of the agreement they now seek to enforce, particularly with regard to the consideration which is stated to be $10,000.00, whereas, the appellants are seeking to enforce a contract for a consideration of $9,800.00, and the very deed which they now seek to claim as a sufficient memorandum of the contract was refused by them for the express reason that they claimed the consideration to be different from that stated in the deed. In this connection, appellants say in their brief: "The parties were not making a new contract or altering the one made but were endeavoring to correct a trifling mistake," and argue that the statute of frauds does not require the consideration to be expressed in the written contract, and that the true consideration may be shown by parol, where the contract is sought to be avoided under the statute of frauds as well as in any other case. If it is true that a party may contract in writing to purchase certain real estate for a specific sum and then, in an action to enforce that con-

tract, compel the other party to convey for a less sum, the statute of frauds should certainly be repealed. There is, however, in our judgment, no basis for the contention of appellants on this point. The first case cited by them, Kickland vs. Menasha Woodenware Company (Wis.) 31 N. W. 471, illustrates the weakness of their position. That was an action for the price of land sold and conveyed, and it was merely held that the plaintiffs might prove by parol what was the whole consideration of the sale and that a considerable part thereof had not been paid, though not thereby to impeach the title conveyed by the deed, and the rule was limited to permitting to be shown by parol a consideration for the conveyance additional to that recited in the deed.

Eighth. This is a letter signed by Halsell and could not in any way bind Renfrow, or constitute a writing signed by him. It shows upon its face that at no time where the appellants willing to take anything the appellee could possibly have given them in the way of possession, and in effect declines to consumate the deal by making a condition known to the writer to be impossible of performance.

Ninth. The letter of March 1st from Renfrow to Halsell was written after Halsell had written him that appellants would not take the land without immediate possession, which they knew Renfrow could not give, and insisting that they would not accept anything but a

literal performance which they knew was impossible. This letter shows that it had been Renfrow's intention to convey the land known as the Cunningham tract to Halsell, but that in their negotiations they had failed to reach an agreemnt as to the matter of possession. It refers in no way to the telegrams, and merely gives the result of the unsuccessful attempt of the parties to agree upon the terms of the proposed sale, with a statement on Renfrow's part that he had been anxious to make the sale, and had offered to do all that was possible for him to do.

GENERAL OBJECTION TO THE SUFFICIENCY OF ALL THE WRITINGS.

First. Under the law in force at the time of the pretended contract a memorandum of the sale of real estate to answer the statute of frauds must have been signed by both parties. Of the nine instruments relied upon by appellants to establish their contract, none were signed by any of the appellants, except the check, which cannot be considered, for the reason above stated, and the letter and tender by Halsell. The other writings were all signed either by Renfrow or Shields alone. Section 4 of chapter 8, session laws of Oklahoma, 1897, provided:

"No deed or mortgage, contract or agreement relating to real estate or any interest therein, other than for a lease for a period not to exceed one year, shall be

valid until reduced to writing and subscribed by the parties thereto."

The effect of this section as applied to contracts for the sale of real estate was considered by the Supreme Court of Oklahoma in the case of McCormick vs. Bonfils, 9 Okla. 605. We quote from page 618:

"It was held by the District Court in this case that Sec. 4 requires that an agreement such as the one relied upon in this case should be reduced to writing and subscribed by the grantor and grantee. Counsel for plaintiff insists that this construction of the statute is erroneous. Without expressing any opinion as to the proper construction to be placed upon this act of the legislature, so far as a deed or mortgage is concerned, we think the language used by the legislature in this act is such that the construction of the district court placed theron is correct. The Act expressly provides that all contracts of this kind to be valid must be reduced to writing and subscribed by the parties thereto. We can only gather the legislative intent from the language used. The parties to such contract, of course, would be the plaintiff and defendant in this case, and we do not think that any error was committed by the court in construing this language to mean that to make this contract valid and binding, under the terms of this section of the statute, it should be subscribed by the plaintiff and defendant."

It will be noted that in the case cited, the pretended contract was contained in the lot of letters, some signed by the plaintiff and some signed by the defendant showing the theory of the court to have been in accordance with sound reasoning, that a contract is not signed by

both parties where a part of it is signed by one party and a different part is signed by the other.

On page 13 of their brief, counsel for appellants contend against this construction of the section quoted by the argument that every law must have a reasonable interpretation, ignoring the fact that the supreme court of the territory has passed upon this particular statute and the further fact that, if it was intended by the legislature that this section merely required that the party to be charged sign the contract, it would have been easier to have enacted a statute in the usual form, instead of saying that the contract shall be subscribed by the parties thereto.

Second. The obligation, if any, created by the writings was not binding upon the appellants and, therefore, the contract was invalid for want of mutuality.

"When a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other."

Rutland Marble Co. vs. Ripley, 10 Wall. 339, 19 Law. Ed. 955.

"The obligation must be mutual. 'In general terms, it may be said that unless the contract binds all the parties, it will be enforced against none of them."

22 Amer. & Eng. Enc. (1st.) 1019.

American Cotton Oil Co. vs. Kirk, 68 Fed. 791.

M. K. & T. Railway Co. vs. Bagley, (Kans.) 56 Pac. 759.

It must be apparent that, under the writings in this case, there never was a time when Renfrow could have

enforced specific performance against the appellants for none of them were ever legally bound to do any thing, and it follows necessarily that appellants cannot enforce the claimed contract against Renfrow.

Third. But, even if there had been a written contract, such contract is not one appellants are seeking to enforce. If there ever was any written contract it was to convey land in consideration of $10,000.00, while the contract they now seek to enforce is to convey a less tract in consideration of $9,800.00. In other words, if there was a written contract, appellants are not seeking to enforce it but are trying to enforce a parol modification therof.

"A stipulated price enters into legal contemplation of an agreement; and therefore, a note or memorandum which does not furnish evidence of price, is not sufficient to take a contract of sale out of the statute of frauds and perjury.

"A written contract falling within the statute of frauds cannot be varied by any subsequent agreement of the parties, unless such new agreement is also in writing."

Swain vs. Seamens, 76 U. S. 254, 19 Law Ed. 554.

IV.

THAT THERE WAS NEVER EVEN AN ORAL CONTRACT BETWEEN THE PARTIES, THE TERMS OF WHICH WERE ALL AGREED UPON.

One of the issues in the trial court being whether the minds of the parties ever met upon all the terms of

a contract, and that court having found generally in favor of the defendants, is equivalent to a special finding that there was never even an oral contract. This is strengthened by various parts of the opinion of the supreme court which says: "The evidence fails to establish a contract; on the contrary, it is clearly apparent that the question of delivering possesion of the tract was one that the minds of the parties never did meet upon. * * * There was no parol agreement ever reached by the parties. The writings do not constitute a contract in writing, nor do the oral negotiations and partial writings constitute a parol agreement." (Record 131).

If there was ever a contract of any kind between the parties it was the contract shown by the two telegrams which was to sell forty acres of land for $10,000.00, cash. This is not the contract appellants seek to enforce for the two reasons that the land they are claiming is not 40 acres and is not all of the land they had in mind at the time the telegrams were sent, and they deny that they are to pay $10,000.00, but claim the correct amount is $9,800.00. In other words, they are seeking to enforce what they say was agreed upon at a conference held in the Lee Hotel by deducting a part of the land originally claimed by them and also deducting $200.00 from the consideration. This conference was held after all parties knew that immediate possession of the land could not be given by Renfrow and the parties were discussing at the same time two distinct questions with

reference to this trade: First, What deduction should be made, if any, from the purchase price on account of the 50x100 not being owned by Renfrow; second, what arrangement could be made as to possession. Here were two things upon which the minds of the parties must have met before there could have been a completed oral contract. Upon the first proposition, their minds probably met, but upon the second appellants do not contend that there was any agreement. That there can be no contract unless there is full meeting of the minds of the parties upon all the terms thereof is elementary law If two persons are negotiating a sale they may agree upon the property to be sold, the price to be paid therefor and the terms of payment, but as long as there is anything in relation to the proposed sale that constitutes a difference between them, no trade has been made.

"Where the existence of a contract is a matter of doubt equity will not, as a rule, decree specific performance, especially in the case where property was rapidly rising in value."

DeSollar vs. Hamscome, 158 U. S. 216, 39 Law Ed. 956.

The statement of facts in the case cited show a contract nearer completed than the one at bar.

"Specific performance of an alleged contract will not be enforced unless the court can clearly see upon what proposition the minds of the parties have met in common intention."

Krum vs. Chamberlain (Nebr.) 77 N. W. 665.

"A suit for specific performance can only be maintained where the terms of the contract are so precise that they cannot be reasonably misunderstood; and specific performance will not be granted to enforce an agreement if any of its provisions are so far indefinite or ambiguous as to render it uncertain what were the intentions of the parties and what obligations they intended to assume."

Minn. Tribune Co. vs. Associated Press. 83 Fed. 350.

The contract sought to be enforced in this action is the conveyance of certain land in consideration of $9,800. All the evidence shows that at the time the $9,800.00 was spoken of the parties were also discussing between them the question of possession and we would like to have it pointed out where the evidence shows that the parties ever came to any agreement as to what should be done about possession.

V.

THAT THERE WAS NOT A SUFFICIENT PART PERFORMANCE TO TAKE THE CASE OUT OF THE STATUTE OF FRAUDS.

Appellants claim that there was such part performance of the pretended contract by the payment of a part of the purchase price and the taking of possession as to take the case out of the operation of the statute. They apparently admit the rule, about which there is no question, that part payment alone is insufficient and

base their claim of part performance upon possession. We contend that there has been no such part performance as to take the case out of the statute for several reasons:

1. Appellants never did take possession of the land or any part of it until long after this suit was commenced, when they took it by force. (Record 74-76-90-91-125). That possession obtained by force or wrongfully will avail nothing, see 1 Sugden on Vendors 152, Star page. Prior to the commencement of this suit they merely made an unsuccessful attempt to take possession, but found the land in the possession of another party and so left it.

   Possesion to avail under the statute of frauds must be actual, open, notorious, definite and exclusive. How can their possession be said to be actual or exclusive when they were forcibly driven off the land by another. On page 19 of their brief, counsel for appellants complain that the parties cannot be restored to their original position with reference to possession. An examination of the testimony, however, shows that Springstein immediately and promptly restored them to their original position when they attempted to survey this land.

2. Possession in order to take a contract out of the statute of frauds must have been taken at the time of making the contract sought to be enforced or subsequent thereto.

   "Acts done prior to the contract, since they are neither in pursuance nor any execution of it, are never a part of the performance upon which to base a specific enforcement of the agreement in a court of equity; and therefore

possession taken when the negotiations between the parties began and in anticipation of rights which might accrue from an expected contract, is held to be unavailing as an act of part performance."

Pomeroy on Specific Performance, Sec. 110.

The contract which appellants seek to enforce if made at all was made at the conference at the Lee Hotel while all acts of theirs with reference to taking possession were done before that time. In this connection, it should be borne in mind that they now seek to enforce a pretended contract as they claim it was modified at the Lee Hotel conference and they are not asking to enforce the contract made by the telegrams, if the telegrams made a contract.

"Parol modifications of a written contract which is within the statute of frauds is not validated by a part performance of the written contract, consisting of platting land included therein."

Buttz vs. Colton, (Dak.) 43 N. W. 717.

3. The acts done were not in execution of a sale but merely preparatory or introductory to an expected sale. The testimony on behalf of appellants shows that they told Shields they would like to get the property on the market as soon as they could and asked permission to commence surveying it and getting it ready. Such acts are not a sufficient part performance.

"Act subsequent to the contract and even in pursuance of it, if not strictly in performance of the contract as between the parties to it but preparatory to such performance, cannot be taken as part performance * * therefore, giving instructions, for the lease, putting the

deed into a solicitor's hands to prepare a conveyance, giving orders for the conveyance to be drawn and going several times to view the estate the execution and registration of deeds by the vendor, and the measurement of the estate have all been decided not to be acts of part performance binding on the other party to the contract."

Fry on Specific Performance, Sec. 599.

The whole theory of part performance is that the party shall have placed himself in such a position that it would be a fraud upon him to refuse performance. In this case to refuse performance will leave the parties, with reference to possession, just where they were when the suit was begun.

"Although its operation (the doctrine of part performance) has doubtless been beneficial, and the principles and rules upon which it rests are firmly established, yet the courts are careful not to extend it to new circumstances or relations not embraced within those rules and principles. That the statute of frauds is a wise and politic enactment, and accords with the common experience of mankind, is shown by its adoption in nearly all of the states, and the tendency at the present day is strongly in favor of sustaining and enforcing its provisions."

Pomeroy on Contracts, page 139.

On the same page is quoted the opinion of Lord Redesdale in Lindsay vs. Lynch as follows:

"The statute was made for the purpose of preventing perjuries and frauds; and nothing can be more manifest to any person who has been in the habit of practic-

ing in the courts of equity, than that the relaxation of the statute has been a ground of much perjury and much fraud. If the statute had been rigorously observed, the result would probably have been that few instances of parol agreements would have occurred. Agreements would, from the necessity of the case, have been reduced to writing. Whereas it is manifest that the decisions on the subject have opened a new door for fraud, and that, under pretense of part execution, if possession is had in any way whatever, means are frequently found to put a court of equity in such a situation that, without departing from its rules, it feels itself obliged to break through the statute. It is, therefore, absolutely necessary for courts of equity to make a stand and not to carry the decisions further."

To conclude all controversy under this heading, the court has found by its general finding that the appellants never did take possession or do any other act in part performance and by authority of Renfrow, and that question is now at rest by this finding amply supported by the evidence. (Record 100). This view is also adopted by the supreme court of the territory, which says: "We do not think the manner and time of taking possession by the plaintiffs in this case and the character of the work done on the land was done with the consent of Mr. Renfrow." (Record 132).

VI.

ARE APPELLEES ESTOPPED FROM DENYING THE VALIDITY OF THE CONTRACT.

The claim is made that Section 7 of the Conveyancing Act of 1897 which reads:

"Any person or corporation, having knowingly received and accepted the benefits, or any part thereof, of any conveyance, mortgage or contract relating to real estate shall be concluded thereby and estopped to deny the validity of such conveyance, mortgage or contract, or the power or authority to make and execute the same except on the ground of fraud; but this section shall not apply to minors or persons of unsound mind who pay or tender back the amount of such benefits received by themselves;" modifies the provisions of Section 4, which provides that " no deed, mortgage, contract or agreement relating to real estate or any interest therein other than for a lease for a period not to exceed one year shall be valid until reduced to writing and subscribed by the parties thereto," to the extent that a partial payment of the purchase price and its retention by the vendor will make a case of estoppel or part performance which obviates the entire force of the provisions of Sec. 4 and makes a verbal contract good. It would be hard to understand why the legislature in one instance would enact a law which would be more rigid in its requirements than the original type of all of the statutes of frauds, requiring the signature of both parties instead of the party to be bound by the obligation merely ,and at the same time overturn this rigid requirement by loosening up in the other direction in favor of acts of part performance taking the case out of the statute which would not do so at common law. If the construction contended for by counsel is correct, the legislative policy would be incapable of explanation. In other words, under the existing state of the statutes you would have to do more in Oklahoma in the way of a written contract to have it comply with the statute of frauds by the force of the writing, and to do less to take the case out of the statute of frauds than at common law, a policy which would be incapable of a rational explanation. At common law

even full payment of the purchase money without a written memorandum would not take the case out of the statute. On this proposition the authorities are uniform, except in the single state of Iowa, where there is an express statute making part payment sufficient to make a verbal contract of sale binding. See Pomeroy on Specific Performance Sec. 112.

There could have been but one idea in the mind of the Legislature in passing a more rigid statute than the English Statute of Frauds and Perjuries, and that was to make the rule of written proof more stringent and the requirements greater. They did this in two particulars: First, In requiring the contract to be subscribed by both parties; and second, in requiring a contract instead of a memorandum. In the latter particular, the authorities recognize the distinction in the language between reducing a memorandum of the contract to writing and signing it by the party to be bound and requiring the contract itself to be manifested in writing and subscribed by both parties. The old statute, Par. 821 Statutes of 1893, declared certain contracts (among which the contract in question would fall) invalid unless same, or note or memorandum thereof be in writing. The note or memorandum is one thing and the contract is another. Under the note or memorandum clause, Mr. Reed in his work on statute of frauds, Sec. 325 says:

"The writing need not be the contract itself executed as such by both parties. The note or memorandum though subsequent to the making of the contract if signed by the party to be charged is sufficient. The

memorandum is not the contract, but only the evidence of it."

The statute requiring the contract to be reduced to writing and subscribed by the parties thereto implies a more formal and fuller writing embracing all the details of the contract than a statute requiring some note or memorandum thereof. That the legislature intended these contracts should be executed by both parties there can be no question. Now, why they should progress in this direction to narrow the margin of facts and circumstances surrounding a sale depending on the treacherous memory of witnesses or their more treacherous perversion of facts depending on oral evidence, should require a mutuality of the obligation expressed in the writing and at the same time by Section 7 open wider the door for escape from the force of the statute and give a greater latitude to the play of the forgetfulness or falsification of evidence of witnesses, by making a simple act of part payment sufficient to take the case out of the statute of frauds, we repeat would be imputing to the legislative body an inconsistency of purpose which the courts jealously avoid in construing a statute. The fact is the legislature had no thought of overturning any part of Section 4 by the enactment of the provisions of Section 7. The language of Section 7 any conveyance, mortgage or contract relating to real estate means a contract evidenced in the manner required by Section 4, namely, a contract in writing; and it is not

until Section 4 has been complied with by creating a contract in writing that Section 7 has any application. Under the various complex transactions in connection with real estate abundant causes arise for the avoiding of deeds or contracts after they have been executed in accordance with the statute of frauds as from false representations under which signatures may be procured, violation of some positive enactment such as requirement of revenue stamps, duress, fraud and other instances too numerous to mention. The legislature intended to do nothing more by the act in question than to emphasize and announce the wholesome rule that after a contract was properly executed in accordance with the requirements of the conveyancing law that that contract should remain binding upon the party knowingly receiving the benefits. In fact, the word "knowingly" would seem to imply that the object sought to be gained by Section 7 was to prevent a party from receiving the value of the contract knowing that he had been wronged or defrauded and keep the money or consideration paid him and at the same time repudiate or rescind the agreement. Many instances of this kind exist where a transaction is positively prohibited by the law as in case of gambling contracts where a consideration might be paid and retained by the party receiving it and where he could both keep the consideration and refuse to execute an unexecuted agreement with regard to the land. Section 7 can have full play over the sub

ject that it was designed to reach without in any way being considered as modifying Sec. 4. The very language of Section 7 implies that the contract that is upheld on the principle of estoppel is a contract which is already passed under the requirements of Section 4. The section means written documents and not verbal understandings with reference to real estate.

We therefore respectfully submit that if the appellants have not forfeited their right to recover back the $500.00 on account of the wilful and fraudulent mutilation of the documents in evidence for the purpose of trying to make a written contract where none existed that the law remits them to the simple action for money had and received against Mr. Shields or the appellee Renfrow as the facts may warrant recovery. In this same connection it might also be remarked that the evidence clearly shows that the appellee, Renfrow, has never received any part of the $500.00 in controversy, that he has refused to accept, keep or retain any part if it and that the money is still in the hands of Shields. (Record 118). The territorial supreme court found that Renfrow never has received or accepted the money. (Record 133).

VII.

THAT EDWARDS IS AN INNOCENT PURCHASER AND THEREFORE NO SPECIFIC PERFORMANCE COULD BE HAD.

There will be no dispute between the parties hereto but that, if Edwards was an innocent purchaser of the property for value specific performance becomes impossible and there can be no decree for such performance in appellant favor; on the other hand if Edwards purchased with knowledge or notice of appellants' rights, then specific performance may be had against Edwards, provided the appellants are entitled to specific performance as against Renfrow.

The authorities seem to discuss the effect of notice rather than the question of what constitutes notice which seems to be more a matter of evidence than a question of law.

There are, however, some rules which should be borne in mind in considering the question. For instance, "The question upon constructive notice is not whether the purchaser had the means of obtaining and might by prudent caution have obtained knowledge in question but whether the not obtaining it was a matter of gross or culpable negligence."

2 Sugden on Vendors, page 529.

"The rule of equity not to relieve against a purchaser having the legal estate is not confined to a prudent or wary purchaser, but to a bona fide one without notice."

Id. page 551.

"If a purchaser had notice only that a draft of a deed was prepared, and not that the deed was executed he would not be bound by the notice, although the deed

realty was executed, for a purchaser is not to be affected by a notice of a deed in contemplation."

Id. page 567.

We think it may safely be said that to charge a purchaser with notice it is not sufficient to show that he knew that certain parties were negotiating for the purchase of the land, but that it must be shown that he knew or that he was guilty of gross negligence in not knowing that a sale had been so far completed that the purchasers acquired legal rights thereunder. For instance, a man is not to be prohibited from buying a tract of land merely because he knows that someone else has been trying to buy it. Applying this idea to the case at bar, Edwards is not to be charged with notice of appellants' rights if they had any, unless he knew, or was guilty of gross negligence in not knowing at the time he purchased of Renfrow that the negotiations between Renfrow and the appellants had progressed so far as to create an enforceable right in the appellants. That Edwards was a purchaser for value cannot be questioned. The only question is as to his notice of appellants' rights, provided they had any, which we deny.

Now the evidence merely goes to the extent of showing that Edwards had been negotiating for the purchase of this land before the pretended contract with appellants, that he knew at the time that appellants were also negotiating for its purchase. (Record 91 to 93). He also knew that Renfrow came to Oklahoma City for the

purpose of closing the trade, but was unable to do so, that after his return to Joplin he sent a deed, to be tendered to appellants, and that such deed was not received by them, but had been returned to Renfrow, Edwards never knew until long after he purchased, the actual condition of the negotiations between appellants and Renfrow. We submit that any ordinary man desiring to purchase a tract of land, and merely knowing what Edwards did at that time that other parties had been negotiating for it, would be fully justified in assuming that the contemplated deal had fallen through with and that he was then at liberty to negotiate with the owner for its purchase. It surely cannot be said that his failure to know that an enforceble contract had been made between the parties was due to any gross or culpable negligence, and, unless it was, no specific performance can be had, regardless of whether appellants had a contract enforcible against Renfrow. The finding of the court being in Edwards' favor puts the matter at rest.

VIII.

THAT BY THE FRAUDULENT ALTERATION OF THE CHECK THE WHOLE CONTRACT BECOMES UNENFORCEABLE EVEN IF THE DOCUMENTS WERE OTHERWISE SUFFICIENT TO CONSTITUTE A WRITTEN CONTRACT.

It seems that Land gave Shields a check for $500.00

as a forfeit on the purchase price of the property; this check was written as an ordinary bank check, and was subsequently to that time, as admitted by the appellants, and after the check had been paid by the bank, altered by inserting the fact that it was given in part payment for the land in controversy. (Record 23). It was also further altered by affixing thereto a United States revenue stamp and canceling same, (Record 23), and if it was admittedly true that the chain of papers urged by appellants constitutes a good contract, still the alteration of the check would overthrow the entire contract, avoid the future enforcement of its unexecuted provisions and defeat any recovery of any consideration paid on account of such a contract. The recitation in a bill or check of the consideration for which it is given added to the check after its execution vitiates it as against any party.

Paragraph 831, Wilson's Statutes of Oklahoma, 1903, and which was in force at the time, reads as follows:

"The intentional destruction, cancelation, or material alteration of a written contract, by a party entitled to any benefit under it, or with his consent, extinguishes all the executory obligations of the contract in his favor against parties who do not consent to the act."

The fact that the alleged contract is embraced in numerous documents brings it under the rule that the material alteration of one of them forfeits all rights under all of them. No attempt was made to explain

this alteration, and the fact of a material alteration in the contract is presumed to be fraudulent until the contrary is made to appear by the party making the alteration.

Soaps vs. ———— 2 Ills App. 375.
Dietz vs. Harder 72 Ind. 203.
Eckert vs. Pickle, 59 Iowa, 545.
Davis vs. Eppler, 38 Kans. 639.
Phoenix Ins. Co. vs. Kerny, 100 Ky. 97.
Owen vs. Hall, 70 Md. 96, 16 Atl. 376.

The fact that appellants admit their fraudulent conduct in making this alteration does not advance their case, because an instrument once altered cannot be restored.

Robinson vs. Reed, 46 Iowa, 219.
Shepherd vs. Whetstone, 51 Iowa, 457, 1 N.W. 753.
Botton vs. Edwards, 2 Dana (Ky.) 106.
Lockana vs. ———— 74 Ky. 69.
Citizens Natl Bank vs. Richmond, 121 Mass. 110.
Warpole vs. Ellison 4 Huston (Del.) 322.
Lock vs. Walker, 2 Ark. 4.
Fulner vs. Seitz, 68 Pa. St. 237.

It must be assumed for the purpose of this case that the alteration was fraudulently made.

Burwell vs. Orr, 84 Ill. 464.
Inglish vs. Breneman, 9 Ark. 902.
Eckert vs. Louis, 84 Ind. 895.
Pyle vs. Oustatt, 92 Ill. 209.
Wilson vs. Harris, 55 Iowa 507.

"Where an action is brought as on the original indebtedness the alteration of the written security or evidence of the debt is presumed fraudulent, and the bur-

den of the proof is upon the plaintiff to show that there was no fraudulent intent when the alteration was made."

Warder et al vs. Willyard (Minn.) 49 N. W. 300.
See also Croswell vs. Lebree, 81 Me. 44, 16 Atl 331.
Citizens Natl. Bk. vs. Williams, 174 Pa. St. 66.

Our statute makes the rule very stringent by defeating the instrument if alterations are wilfully and intentionally made.

"The vitiated effect of an alteration cannot be obviated by afterwards attempting to restore the instrument by erasing the words unauthorizedly inserted, especially after an attempt to recover upon the instrument in its altered form."

Shepherd vs. Whetstone, 51 Iowa, 457.
Hays vs. Wagoner· 89 Ill. 390.
2 Cyc. 182.

"The alteration of any one of several writings, all of which are material to show the actual agreement of the parties will vitiate all of the papers."

2 Cyc. page 224.

Thus the fraudulent alteration of a note will destroy the right of action on the mortgage.

Crawford vs. Hazeltree, 117 Ind. 63, 18 N. E. 603.
Walton Plow Co. vs. Campbell, 37 Neb., 52 N. W. 883.
Vogel vs. Repper, 34 Ill. 100.

The materiality of the alteration of the check is manifest at once when it is remembered that it is the only pretense or written memorandum of the sale in any fashion accepted by Shields, who is claimed to be Ren·

frow's agent. The mere giving of the check and the endorsement on it by Shields imported nothing except a business transaction whereby he was paid $500.00; that it was for the sale of a certain piece of property and part payment on that sale imported everything, because by that Shields in so far as the recitation in the check was concerned manifested his written assent to the terms therein by the written endorsement of the check. And appellants themselves thrust this altered check into court as a basis for their cause of action, counted on it in its altered form, seeking to perpetrate the fraud both upon the parties in interest and the court. The fact that the appellants afterwards became good and retracted that course does not detract from the fact that the check was fraudulently altered, and being a material feature in a chain of documents which it is claimed united to form one single contract which is now sought to be specifically enforced, invalidated the whole transaction.

"An oral agreement for the sale of land by defendant to plaintiff was, by agreement, reduced towriting by plaintiff, who handed it to defendant's agent, with a check for the earnest money provided for in the contract and told the agent that when defendant signed the contract he was to give him the check, and then returned the contract to plaintiff. The contract stated that it was for the sale of forty acres of land at $300 an acre, but the agent, before giving it to defendant to sign, added the words, "more or less" after the words "forty acres." Defendant signed the contract in that form and was given the check, and the contract was returned to plain-

tiff, who, as soon as he discovered the alteration, offered it back to defendant and demanded his check, but defendant insisted on the fulfillment of the contract as signed. Held, that the alteration avoided the contract, and plaintiff was entitled to recover his check."

Sherwood vs. Merritt, 53 N. W. 512.

"Where a contract is evidenced by several writings, all of which are material to show the actual agreement of the parties, the fraudulent alteration of any of them by one of the parties invalidates all."

Meyer vs. Huneke, 55 N. Y. Crt. of App. Star page 416.

IX.

THAT APPELLANTS ARE ESTOPPED BY HAVING REFUSED THE ONLY PERFORMANCE POSSIBLE.

The appellants are also estopped from asking specific performance in this case from the fact that they refused the deed as tendered by Renfrow for the specific reason that he could not deliver them immediate possession of the land.

"Plaintiff and defendant agreed to exchange real property, and that the deeds should be delivered by a certain date if the titles were perfect. Defendant objected to plaintiff's title and demanded a guaranty of title from a trust company. Held, that a letter from plaintiffs attorney during the negotiations as to the plaintiff's title, stating that plaintiff ought not to be required to give a guaranty, because defendant's title was more defective than plaintiff's did not estop plaintiff from demanding specific performance of the contract,

since the letter did not amount to a refusal to accept defendant's title."

Scannell vs. Amer. Soda Fountain Co., 68 S. W. 890.

In the case cited, while not expressed, the doctrine is clearly recognized that if the plaintiffs had refused to perform, on account of defendant's defective title, that they could not afterwards enforce such performance.

In the case of Oliver Mining Co. vs. Clark (Minn.) 68 N. W. 23, the court, on page 24 of the opinion, says:

"When the plaintiff refused Clark's title that title was hopelessly involved. It was wholly out of Clark's power to clear it, and there was no probability whatever that it would ever be any better. Under these circumstances, a refusal by plaintiff to accept the title was intended to be an irrevocable refusal, and the exploration company had a right so to undertsand it. What was there at that time for plaintiff to wait for? It could not lie by, act dog in the manger, refuse an incurable title itself, and for an indefinite length of time prevent every one else from taking title. Under the circumstances appearing in the complaint, the exploration company had a right to regard plaintiff's refusal to accept this incurable title as an election to proceed for damages, if for anything."

Applying the same reasoning to the case at bar, when appellants refused to perform without immediate possession being given, the possession was hopelessly involved. It was wholly out of Renfrow's power to give it. Under these circumstances, the refusal by appellants to accept the deed without immediate possession was intended to be an irrevocable refusal, and Renfrow had

a right so to understand it. What was there at that time for appellants to wait for? They could not lie by, act dog in the manger, refuse the only possession that was possible and for an indefinite length of time prevent every one else from taking that title. Under the circumstances Renfrow had a right to regard appellants refusal to accept the deed with the only possession that was possible as an election to proceed for damages, if anything. They were unwilling to take the land without immediate possession until it had greatly enhanced in value, when they suddenly became anxious to have it, and began asserting that they had been in possession all the time.

"Where the purchaser of land has an option to avoid the contract for objections to the title any delay in deciding whether he will accept the same will defeat his right to a specific performance.

"Where the purchase of land is made upon condition the title is found good, the purchaser is only entitled to a reasonable time in which to determine whether he will take the title the vendor has, or reject it. He cannot keep the contract open indefinitely, so as to avail of a rise in the value of the property or relieve himself in case of a depreciation.

"Time may be implied as essential in a contract from the nature of the subject matter of the contract. If the thing sold be of greater or less value, according to the effuxion of time, then time is of the essence of the contract, and must be observed in equity as well as at law."

Hoyt vs. Tusbury et al. 70 Ill. 332.

"When, at the time of the sale of real estate, the

vendor offers the vendee all the title he has in the premises, both parties knowing at the time that the vendor's title is not perfect, and the vendee at a subsequent day brings a bill of equity to enforce against the vendor the conveyance of a perfect title, the bill will be dismissed."

Mills vs. Van Vohris, 23 Barb. (N. Y.) 125.

"Plaintiff filed a bill in equity to compel defendant to convey coal lands in pursuance of agreement. Upon the hearing of the bill it was shown that the defendant's paper title was defective, and that the plaintiff had insisted that defendant get the proper release to make it good, which defendant made an attempt to do and partially succeeded. Subsequently, while plaintiff was insisting that the title be perfected, defendant sold the coal to a third person at an increased valuation. Held, that plaintiff could not refuse to take title on account of its defects, and at the same time hold defendant to her contract, and decree for specific performance should be refused."

Respectfully submitted,

WILLIAM C. RENFROW,

R. J. EDWARDS,

Appellees.

By JOHN W. SHARTEL

JAMES R. KEATON,

FRANK WELLS,

Their Attorneys.